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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 474

HELEN SEARS BRADLEY ET AL., PETITIONERS

v.

WILLIAM M. WELCH, FORMER COLLECTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 87–100) is reported in 37 F. Supp. 788. The opinion of the Circuit Court of Appeals (R. 156–167) is reported in 130 F. 2d 109.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1942 (R. 167), and the pe-

tition for a writ of certiorari was filed October 22, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The taxpayers, mother and daughter, owned as tenants in common two-thirds and one-third interests respectively in real estate, which they conveyed in trust. Under the terms of the trust, the grantors retained their proportionate interests in the income during their joint lives and the power jointly to revest in themselves in the same proportions any part of the trust property. Each had the power to dispose of her proportionate share by will. In default of appointment by the mother, the daughter would receive the mother's two-thirds share if she survived; in default of appointment by the daughter, her one-third share would pass to her heirs.

The question is whether the income of the trust is taxable to the grantors under Section 166 (1) of the Revenue Acts of 1932 and 1934. The answer depends upon whether each of the grantors retained as to her respective share a power to revoke "in conjunction with" a "person not having a substantial adverse interest."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

In 1910 Sarah C. Sears acquired an undivided two-thirds interest and her daughter, Helen Sears Bradley, an undivided one-third interest in certain real estate. On December 31, 1920, by concurrent action, the property was conveyed to Mrs. Sears as trustee to manage the property and to divide the trust income between the grantors during their joint lives, two-thirds to Mrs. Sears and one-third to Mrs. Bradley. (R. 89.) The indenture contained the following provision for termination of the trust during their joint lives (R. 89):

> At any time during the joint lives of said Sarah C. Sears and said Helen Sears Bradley, upon the written request to the trustee or trustees hereunder signed and acknowledged by both the said Sarah C. Sears and said Helen Sears Bradley, this trust may be terminated as to any portion of the trust estate or as to the entire trust estate according to the terms of such request, and thereupon two-thirds of the trust estate or such portion thereof as is covered in such request shall be conveyed to the said Sarah C. Sears, and one-third thereof to the said Helen Sears Bradley, free and discharged of all trusts. * * *

The indenture further provided that upon the death of Mrs. Sears, two-thirds of the principal of the trust would pass to such persons and for such purposes as she should appoint by will. In de-

fault of appointment, and if Mrs. Bradley were still living, the entire estate would continue to be held in trust and the net income would be paid to Mrs. Bradley during her life; then, upon her death, the principal of the trust would pass as she should direct by will or, in default of such appointment, to the persons who would be entitled to the property if she had died possessed of it as her own. (R. 90.)

If Mrs. Bradley died first, one-third of the principal would pass to her appointees by will. If she failed to appoint, one-third would pass to the persons entitled to the property if she had died possessed of it as her own. The remaining two-thirds would be continued in trust, the net income to be paid to Mrs. Sears for life. Upon the death of Mrs. Sears, after Mrs. Bradley, the entire remaining principal of the trust would pass as Mrs. Sears should direct and appoint by will, or in default of appointment, to those persons who would be entitled to receive it if she had died possessed of the property as her own. (R. 91.)

The survivor was empowered at any time to terminate any portion of the trust that should continue. (R. 89–90.)

The Commissioner determined that the income of the trust for the years 1932 through September 26, 1935, was taxable to the grantors under Section 166 of the Revenue Acts of 1932 and 1934, and that therefore the basis for depreciation of the

trust property continued to be its basis in the hands of the grantors prior to the creation of the trust. (R. 45–46.) Refund suits were brought by the executors of Mrs. Sears and by Mrs. Bradley and tried together by stipulation. (R. 41.)

The District Court rendered judgments on behalf of the taxpayers (R. 51, 86–87), sustaining their contentions (1) that the income was not taxable to the grantors under Section 166, and (2) that even if Section 166 were applicable, the basis of the property was its market value at the date of acquisition by the trust under Section 113 (a) (4) of the Revenue Acts (R. 92–100).

The court below, on consolidated appeals (R. 155), reversed the District Court on both points (R. 167). The taxpayers seek review only of the first. (Pet. 2.)

ARGUMENT

1. Section 166 (1) of the Revenue Acts of 1932 and 1934 (Appendix, *infra*) provides that where the power to "revest in the grantor title to any part of the corpus" of a trust is vested "in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom," then "the income of such part of the trust * * * shall be included in computing the net income of the grantor." Under the terms of the trust indenture, Mrs. Sears and Mrs. Bradley ex-

pressly reserved the right by joint action to have any part or all of the trust property returned to them in two-thirds and one-third proportions corresponding to their original contributions. Each grantor, therefore, retained the power to revest in herself, in conjunction with the other, the portion of the corpus representing her original share of the trust property. The issue, therefore, is whether either party had a "substantial adverse interest" in the part of the corpus or the income which would thereby revert to the other.

Under the trust, Mrs. Bradley had a remainder interest in her mother's share, contingent upon survival, essentially equivalent to complete ownership. That interest, however, was dependent upon Mrs. Sears' failure to exercise the unrestricted power, which she held under the trust, to dispose of the property by will. Thus, Mrs. Bradley's chances of receiving the property under the trust were not materially greater than her chances of receiving it as her mother's heir if the trust were revoked.

To be sure, upon revocation Mrs. Sears could also dispose of the property *inter vivos*. But so long as Mrs. Sears retained the power to dispose of the property by will, Mrs. Bradley, from any practical standpoint, would not stand to gain by obstructing any wish her mother might have to dispose of it during her lifetime. Furthermore, as the court below pointed out, whatever slight pecu-

niary interest Mrs. Bradley might have in the continuance of the trust, would be offset by her pecuniary interest in its revocation, for she would also get back her one-third interest free and clear which thereafter she could convey to third parties in her lifetime.

Mrs. Sears' interest in continuing the trust, if Mrs. Bradley should wish to revoke it, was even more remote. Under the terms of the trust, Mrs. Sears' succession to her daughter's interest was dependent not only upon her daughter's failure to appoint but also upon the contingency that she should be her daughter's heir. Revocation of the trust certainly would not materially impair what slight hopes she might have of succeeding to the property. Clearly, she would not have a substantial pecuniary interest in opposing any wish of her daughter to revoke, particularly when at the same time she would regain complete control over her two-thirds interest.

There is no merit, moreover, in the contention that unity of ownership and management of the property in a trust, as distinguished from a holding by tenancy in common, established in either of the parties a substantial interest adverse to revocation. Each grantor's interests and powers paralleled the other's. There was no implication that complete harmony between them was lacking, or that "the normal consequences of family solidarity" were not to be anticipated. *Cf. Helvering* v.

Clifford, 309 U. S. 331, 337. In these circumstances it is unreasonable to suppose that either would find advantages in a continuance of the trust which would warrant a refusal to assent to revocation.

2. The petitioners contend that since Section 166 applies to the "grantor" who has "power to revest" in himself title to the corpus, it does not by its terms apply to two or more owners of property who put their property into a trust. (Br. 9.) Since this argument was not advanced in the court below, it may be questioned whether it is now available to the petitioners in seeking a reversal. *Cf. Helvering* v. *Wood,* 309 U. S. 344, 348–349; *Burnet* v. *Commonwealth Imp. Co.,* 287 U. S. 415, 418. But apart from this it is obvious that the construction urged would do violence to the plain meaning of the statute as applicable to *each grantor* of property to a trust. Furthermore, under a statute of long standing, "words importing the singular number" in federal enactments "may extend and be applied to several persons or things." Revised Statutes, Section 1 (U. S. C., Title 1, Sec. 1). It may well be argued that if the word "grantor" in Section 166 (1) is thus applied in the plural, the reservation of a joint power of revocation in joint grantors automatically brings the trust under that Section. Thus, the decision below may be supported on the alternative ground that, under the statute, it is unnecessary to inquire

whether or not either grantor had a substantial adverse interest.

3. The decision below is not, as the petitioners assert (Br. 9), in conflict with *Stuart* v. *Commissioner,* 124 F. 2d 772 (C. C. A. 7th), reversed, Nos. 48 and 49, present Term, November 16, 1942. In the *Stuart* cases trusts were involved in which the asserted power to revoke admittedly was not vested in the grantor himself; here the trust instrument expressly provided for termination upon the request of the grantors.

CONCLUSION

The case was decided correctly in the court below, and there is no conflict among the circuits. The petition for certiorari should be denied.

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NOVEMBER, 1942.